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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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October 22, 1996

QUESTION PRESENTED

As a result of a state court proceeding, General Motors (the defendant below) obtained a consent decree enjoining one Elwell from testifying against GM in products liability cases. In a federal court suit brought by petitioners against GM, the court below held that the Full Faith and Credit obligation precluded petitioners from obtaining Elwell's testimony.

The question presented is whether the court below erred in holding that petitioners, who were not parties to the state proceeding or in privity with any party, could be precluded from obtaining the witness's testimony on the basis of an obligation to give Full Faith and Credit to state court judgments.

PARTIES TO THE PROCEEDING

The petitioners in this case are Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas.

The respondent is General Motors Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing (App. 1a)[1] is reported at 1996 U.S. App. LEXIS 18387. The decision of the Court of Appeals on the merits (App. 2a-16a) is reported at 86 F.3d 811. The decision of the District Court addressing the Full Faith and Credit issue (App. 17a-39a) is unreported.

JURISDICTION

On July 26, 1996, the Court of Appeals denied the suggestion for rehearing en banc and the petition for rehearing by the panel. *See* Eighth Cir. Rule 35A(4). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Full Faith and Credit Clause provides that:

> Full Faith and Credit shall be given in every State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings may be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1. The Full Faith and Credit statute

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[1] References to the Appendix to the Petition for Writ of Certiorari are styled "App. _a." References to the trial transcript are styled "Tr. _."

provides in relevant part that:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

This Full Faith and Credit case began as a products liability action by two children whose mother, 29-year-old Beverly Garner, burned to death in an allegedly defective vehicle manufactured by respondent General Motors Corporation (GM). After a jury trial, the U.S. District Court for the Western District of Missouri entered judgment for the children in the amount of $11.3 million. However, the Court of Appeals for the Eighth Circuit ordered a new trial, in part because it held that the Full Faith and Credit obligation prohibited a federal court in Missouri from admitting the testimony of a witness who was subject to a Michigan state-court decree enjoining him from testifying. The Court of Appeals' decision will govern proceedings on remand. The decision rests on an erroneous view of the federal Full Faith and Credit statute, 28 U.S.C. § 1738, conflicts with the decisions of this Court and other courts, and raises an important question of law warranting this Court's plenary review.

1. Background. On Feb. 23, 1990, Ms. Garner was a front-seat passenger in a 1985 Chevrolet S-10 Blazer when it was involved in an auto accident and caught fire. Although rescuers used three fire extinguishers underneath the hood of the Blazer, the flames kept reappearing. Tr. 558-59. Witnesses heard Ms. Garner screaming repeatedly, "It's hot in here. Please get me

out!," Tr. 441-42; "Help me!," Tr. 491, 504-05, 509; and "I don't want to die this way. Please, somebody, help me out!" Tr. 472.

Ms. Garner's children, petitioners here, alleged that the Blazer was defective in that its electric fuel pump continued to pump gasoline to the engine after impact. Specifically, petitioners alleged that the fuel pump relay, designed to shut off the fuel pump when the oil pressure went to zero, was defective because it was placed in a location that made it vulnerable to collisions. In the 1985 Blazer, the fuel pump relay was attached to the firewall, directly behind the engine block, in the "crush zone." Addendum to Appellees' Br. in Ct. App. 1 (July 20, 1995). (In the 1986 Blazer model, the location of the fuel pump relay was changed to the fender well, outside the "crush zone." Appellees' Addendum in Ct. App. 2.) Petitioners alleged that the fuel pump relay on the Blazer was damaged in the collision and allowed the fuel pump to continue pumping gasoline into the fire that killed Ms. Garner. In addition, petitioners separately alleged that the 1985 Blazer should have been equipped with an "inertia switch" to shut off the fuel pump, as GM had proposed in a 1973 patent application.

2. Initial Proceedings in the District Court. Petitioners, who are residents of the State of Missouri, filed a wrongful death products liability action in Missouri Circuit Court on Sept. 27, 1991. GM, which is a Delaware corporation with its principal place of business in Michigan, removed the case pursuant to 28 U.S.C. § 1441 on Nov. 11, 1991 to the United States District Court for the Western District of Missouri. The district court had jurisdiction under 28 U.S.C. § 1332.

After repeated violations by GM of its discovery obligations under Fed. R. Civ. P. 26, the district court found that "General Motors' discovery practices as a whole [have been] conducted with a complete disregard for both the letter and the spirit of the federal Rules of Civil Procedure." *Baker v. General Motors Corp.*, 159 F.R.D. 519, 520 (W.D. Mo. 1994). Accordingly, "[a]fter full hearings and considerable briefing," *id.*, the district

court imposed sanctions against GM. The court ordered that it "shall be established for the purposes of this action" that

> The 1985 Chevrolet S-10 Blazer at issue in this case was defective in that General Motors placed an electric fuel pump in the fuel tank without an adequate mechanism to shut off the pump in the event of a malfunction or collision and that General Motors has been aware of this defect and hazard for many years. The fuel pump in the 1985 Chevrolet S-10 Blazer in this case continued to operate after the engine stopped upon impact.

159 F.R.D. at 528. The district court incorporated this language in its jury instruction. The case proceeded to trial on the sole issue of whether the defect in the 1985 Chevy Blazer "directly caused or directly contributed to cause" the death of Beverly Garner. Tr. 1725.

3. The Elwell Testimony. At trial, the district court permitted petitioners to introduce the testimony of Ronald Elwell, who was a GM employee for nearly 30 years beginning in 1959. App. 18a. For roughly the first 10 years of his employment with GM, Elwell's primary duties involved the development of door latches and latching mechanisms. Tr. 379. In 1969, Elwell assumed responsibility for a Reliability Program that coordinated quality inspection for products shipped to GM plants. *Id.*

In 1971, Elwell was assigned to the Engineering Analysis Group, which was responsible for providing engineering services to GM's different divisions. Elwell concentrated in the area of fuel systems and fuel-fed fires. App. 18a. As a member of the engineering group, Elwell assessed the performance of GM vehicles in order to advise engineers who were responsible for developing and designing future vehicles. *Id.* He suggested changes in GM fuel line designs. *Id.* He conducted research and studied accidents in the field involving fires. Elwell also

reviewed GM literature on vehicle performance prior to its publication, analyzed relevant legislation that had an impact on the vehicles on which he was working, and advised the advertising department on how GM products should be advertised. *Id.*

In addition, Elwell worked with both GM legal staff and outside counsel in preparing defenses to product liability suits. He testified as an expert witness, consulted with engineers on liability issues, prepared demonstrative evidence, participated in litigation strategy planning, and helped to answer discovery requests. App. 18a. In addition, Elwell was repeatedly designated as the GM employee most knowledgeable about fuel systems, pursuant to Fed. R. Civ. P. 30(b)(6). App. 18a. None of this litigation-related work, however, was specifically done in connection with the instant case. *Id.*

Elwell's relationship with GM ultimately deteriorated. Elwell contended that GM had withheld vital information from him, making his prior trial testimony on GM's behalf untruthful. GM contended that Elwell had had disagreements with his supervisors and was disgruntled over his retirement and severance package.

In 1991, Elwell retained his own attorney and testified against GM in a pending products liability case. *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga.).[2] Elwell also filed suit against GM in the Circuit Court of Wayne County, Michigan, alleging wrongful discharge and other tort and contract claims. GM filed a counterclaim against Elwell alleging

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[2] As the district court noted, Elwell's testimony in the *Moseley* case illustrates that "it is possible for Elwell to testify without impermissibly divulging privileged information even as defined by G.M." App. 33a. Although GM's counsel stated on the record in the *Moseley* case that she would object to any questions which invaded GM's attorney-client or work-product privileges, Elwell testified for two days and 370 pages before GM's counsel made a single attorney-client or work-product objection. GM made only three attorney-client objections in the approximately 580 pages of testimony taken during that deposition.

breach of fiduciary duty for his disclosure of privileged and confidential information and his misappropriation of documents. GM sought a preliminary injunction and, after a brief hearing, the court enjoined Elwell from:

> consulting or discussing with or disclosing to any person any of General Motors Corporation's *trade secrets, confidential information or matters of attorney-client work product* relating in any manner to the subject matter of any products liability litigation whether already filed or filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employment with General Motors Corporation.

App. 19a-20a (emphasis added).

Subsequently, GM and Elwell entered into a settlement under which Elwell received an undisclosed sum of money. As part of the settlement, an "agreed" or "stipulated" permanent injunction was entered in the Wayne County Circuit Court without a hearing. The stipulated injunction was considerably broader than the preliminary injunction and prohibited Elwell from:

> (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment General Motors Corporation; and
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> (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial as an expert witness, or a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving General Motors Corporation as an owner, seller,

> manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of the Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

App. 20a-21a. The settlement agreement also provided that if Elwell were ordered to testify by a court or other tribunal, he could do so without violating the settlement agreement. App. 5a.

In the case at bar, GM sought to exclude Elwell's testimony on the ground that the Michigan injunction was entitled to Full Faith and Credit in the federal court in Missouri. After *in camera* review of the Michigan injunction and the settlement agreement, the district court issued an order dated June 18, 1993, allowing the plaintiffs to depose Elwell and to call him as a witness at trial.

The district court explained that Elwell's testimony would be highly relevant:

> The parties agree that Elwell is an expert on G.M. fuel systems, including the design history, fuel system safety, design decision-making and subsequent alternative designs. These are the areas into which plaintiffs wish to inquire.

App. 22a. Further, the district court explained that petitioners had committed not to seek any information that might be subject to the attorney-client privilege or attorney work product privilege, or that otherwise might be confidential. *Id.* The district court held that the Michigan injunction impermissibly attempted to resolve the rights of nonparties:

> Unlike a traditional injunction situation, this injunction established not only the rights of the parties before the Michigan Court where the case in which it was entered was pending (i.e. Elwell, G.M. and engineer Bill Chicowski), but, if defendant were to prevail here, forever

> defined the rights of innocent third parties who have a keen interest in the information which Elwell holds.

Id. at 28a. The court added that "the overbroad injunction has prevented the disclosure of not only privileged information, but much discoverable information as well." *Id.* at 27a-28a. "To prevent the disclosure of this information would be against the public policy of the State of Missouri." *Id.* at 25a. The court observed that "Elwell's cooperation with the injunction was bought for an undisclosed sum of money as one of the terms of the settlement of his claims against G.M." *Id.* at 26a. "The public interest would be severely compromised if injunctions of this sort were entered as a matter of course." *Id.* The district court elaborated:

> Under the injunction, G.M. has not only prevented Elwell from speaking on his own behalf, but no one else may find out what he knows, effectively blockading a litigant's search for the truth and for redress. While G.M. is free to pay Elwell for his voluntary silence, this Court holds that G.M. may not pay Elwell to keep others from finding out what he knows.

Id. at 26a-27a.

Elwell's trial testimony concerned his research on fuel-fed engine fires. Elwell testified in support of petitioners' claim that the alleged defect in the fuel pump system contributed to the post-collision fire. Tr. 384-89, 391-97. He also testified as to the existence and contents of a memorandum known as the "Ivey" document. App. 6a. The Ivey document is a value analysis prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM and Oldsmobile officials. The Oldsmobile officials, according to Elwell's testimony, were at that time responsible for the overall fuel system design of GM vehicles. *Id.* The Ivey document analyzed the potential expense of the loss of human life per vehicle due to

fuel-fed engine fires. According to Elwell, the analysis implied that the cost to society of deaths and injuries from such fires was only about $2.40 per vehicle. *Id.*

Following trial, the jury awarded Ms. Garner's children $11.3 million in damages.

4. The Court of Appeals' Decision. On appeal, General Motors argued that the district court "violated the Full Faith and Credit Clause by permitting Ronald Elwell to testify in disregard of the terms of an injunction entered by a Michigan court." GM Opening Br. on Appeal 49 (May 31, 1995). In response, petitioners noted, *inter alia*, that they "were not parties to the proceedings resulting in the Injunction." Appellees Br. 59 (July 20, 1995). Petitioners also submitted letters to the Court of Appeals informing it of decisions in other jurisdictions holding that the Michigan injunction could not be applied to bar nonparties to the Michigan proceeding from obtaining Elwell's testimony. *See* Letter of Jan. 16, 1996; April 23, 1996; and May 10, 1996.

On June 14, 1996, the Court of Appeals reversed the district court's judgment and ordered a new trial. As to the discovery sanction, the Court of Appeals agreed that GM had failed to comply with the district court's orders regarding discovery. App. 8a-9a & n.6. The Court of Appeals further agreed with the district court that GM's failure was "willful" and that the plaintiffs suffered prejudice. *Id.* "GM's conduct, therefore, clearly justified the imposition of Rule 37 sanctions." *Id.* at 9a. Nonetheless, the Court of Appeals held that the district court's sanction "was simply too severe for the facts presented and should have been drawn more narrowly." *Id.* at 10a. In particular, the court noted that "'there is a strong policy favoring a trial on the merits and against depriving a party of his day in court.'" *Id.* at 9a (citation omitted). "[T]he opportunity to be heard is a litigant's 'most precious right and should be sparingly

denied.'" *Id.* (citation omitted).[3]

On the Full Faith and Credit issue, however, the Court of Appeals disregarded its own teaching concerning the importance of the right to be heard. The court agreed with GM that the Michigan injunction prevented the district court from admitting Mr. Elwell's testimony. App. 13a-16a. Even though petitioners were unrepresented nonparties in the Michigan proceeding, the Court of Appeals held that they could be bound by it:

> [T]he district court emphasized the importance of other interests, such as the discovery rights of litigants, of which it believed the Michigan court was unaware when it entered the injunction. We find no evidence in the record to support such a statement. A stipulation in which GM expressly approved of Elwell's testimony in another case then pending was executed concurrently with the injunction. The Michigan court was, therefore, aware of the existence of at least some other parties' interests. The district court also would have assumed, as did the parties, that other similar litigation would follow; the injunction would otherwise have been unnecessary. Consequently, we find that the appellees failed to establish that the Michigan injunction was not entitled to full faith and credit.

Id. at 15a-16a (citation and footnote omitted).[4]

On June 26, 1996, petitioners filed a timely Petition for Rehearing En Banc, which under Eighth Circuit Rule 35A(4)

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[3] Petitioners do not seek this Court's review of the Court of Appeals' award of a new trial on the discovery sanctions issue. Rather, this Petition is directed solely at the Court of Appeals' decision with respect to the Full Faith and Credit question, which will limit the testimony that may be presented at retrial.

[4] The Court of Appeals also held that the jury instructions for "aggravating damages" were inadequate. App.10a-13a. Petitioners do not challenge this aspect of the Court of Appeals' ruling.

functioned both as a petition for rehearing and a suggestion for rehearing en banc, and which was treated by the Eighth Circuit as such. App. 1a. Petitioners argued that "[t]he 'agreed injunction' was entered without third parties being provided notice or any opportunity to contest the issuance of the injunction, and is contrary to the Due Process Clause." Pet. for Rehearing 10.

On July 26, 1996, the Eighth Circuit denied the rehearing petition without comment.

REASONS FOR GRANTING THE WRIT

GM attempted to prevent third parties, including petitioners, from obtaining the testimony of its former employee, Mr. Elwell, by entering into a stipulated consent judgment in Michigan state court as part of a settlement with Elwell. The Michigan injunction purported to bar Elwell from testifying even as to non-privileged, non-trade-secret information.

The Eighth Circuit has held that the Full Faith and Credit obligation precludes petitioners from obtaining Mr. Elwell's testimony in a federal court in Missouri. This decision, which will govern the new trial that the Court of Appeals has ordered in this case, is flatly inconsistent with both basic principles of due process and 28 U.S.C. § 1738. It is also flatly inconsistent with numerous decisions in the Courts of Appeals and the state courts holding that third parties cannot be bound as a matter of Full Faith and Credit to judgments of prior proceedings in which they did not participate and in which they were not represented.

If permitted to stand, the Eighth Circuit's ruling would provide wrongdoers with a blueprint for purchasing the silence of potentially vital witnesses, in violation of the ancient maxim that the public has a right to every man's evidence. The Court of Appeals' decision instructs wrongdoers that they need only enter into consent decrees with potential witnesses in which those witnesses promise, in exchange for money supplied in accompanying settlement agreements, never to testify in court.

Contrary to the Eighth Circuit's reasoning, such an assault upon the integrity of the judicial system finds no support in the Full Faith and Credit principle.

1. The Eighth Circuit's decision fundamentally misinterprets the Full Faith and Credit obligation of a federal court under 28 U.S.C. § 1738. As this Court has explained, the statute "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996). The Full Faith and Credit Act, however, does not — indeed, could not — override the basic precept of due process that "a judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

Thus, this Court has recently observed that the "limits on a state court's power to reflect estoppel rules" are a reflection of a "general consensus 'in Anglo-American jurisprudence'" that a person "'is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765-66 (1996) (quoting *Wilks*, 490 U.S. at 761-62, and *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 1766 (citation omitted); *see also Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986) ("parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement . . . And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.").

The Eighth Circuit's decision flies in the face of this principle. It bars petitioners — who are concededly complete strangers to the Michigan proceeding that resulted in the Elwell

injunction — from obtaining his testimony in a wholly separate proceeding.

Yet the Full Faith and Credit obligation is "subject to the requirements of . . . the Due Process Clause." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). A party deprived of a "full and fair opportunity to litigate the claim or issue" cannot be bound under either 28 U.S.C. § 1738 or the Full Faith and Credit Clause. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982) (internal quotation omitted). "In such a case, there could be no constitutionally recognizable preclusion at all." *Id.* at 482-83; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party").[5]

Not surprisingly, therefore, the decision below conflicts with the settled rule that the Full Faith and Credit principle does not mandate enforcement of judgments against non-parties who were wholly absent in the proceeding in which the judgment was rendered. *See, e.g., Riley v. New York Trust Co.*, 315 U.S. 343, 356 (1942) (Stone, C.J., concurring) ("A judgment so obtained is not entitled to full faith and credit with respect to those not parties."); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the

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[5] *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process . . . is not entitled to full faith and credit elsewhere"); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); Restatement (Second) of Conflict of Laws § 104 (1969) ("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.").

Constitution and statute of the United States prescribe . . . ."); *Fall v. Eastin*, 215 U.S. 1, 14 (1909) (Full Faith and Credit did not require Nebraska to bind purchaser of land to divorce decree entered in Washington, because Washington decree "gave no such equities as could be recognized" against third parties).

The Eighth Circuit's ruling conflicts with the decisions of numerous lower courts on this point.[6]

The Eighth Circuit's judgment is also in direct conflict with

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[6] *See, e.g., Stone v. Williams*, 970 F.2d 1043, 1058 (2d Cir. 1992) (persons bound to state-court judgment only if they were parties or privies in that proceeding), *cert. denied*, 508 U.S. 906 (1993); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 180 (3d Cir.) (denying full faith and credit because "a consent decree is an agreement only between parties and does not bind or preclude the claims of non-parties"), *cert. denied*, 484 U.S. 849 (1987); *Jones v. Roach*, 575 P.2d 345, 348 (Ariz. App. 1977) ("a sister state need not give full faith and credit to another state's judgment if . . . the judgment was obtained through lack of due process").

See also City of Philadelphia v. Stadler, 395 A.2d 1300, 1303 (N.J. Super. Ct. 1978) ("a court of this State, when asked to enforce a foreign state judgment, must deny full faith and credit if the rendering court . . . failed to provide adequate notice and an opportunity to be heard"), *aff'd*, 413 A.2d 996 (N.J. App.), *certif. denied*, 427 A.2d 563 (N.J. 1980), *cert. denied*, 450 U.S. 997 (1981); *Wheeler v. Stewart Mapping Serv.*, 377 N.Y.S.2d 965, 968 (App. Div. 1976) ("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.") (internal quotation omitted), *aff'd*, 366 N.E.2d 286 (N.Y. 1977); *Boyles v. Boyles*, 302 S.E.2d 790, 793 (N.C. 1983) (rendering court must "have afforded the parties adequate notice and an opportunity to be heard before full faith and credit will be accorded the judgment"); *Commonwealth of Pennsylvania v. Granito*, 407 A.2d 1371, 1372 (Pa. Commonw. Ct. 1979) (due process forbids full faith and credit "unless the parties have been given adequate notice and an opportunity to be heard"); *Hall v. McCormick*, 580 A.2d 968, 969 (Vt. 1990) (full faith and credit does not apply where "the judgment was rendered without adequate opportunity for defendant to be heard"); *R.R. Gable, Inc. v. Burrows*, 649 P.2d 177, 179 (Wash. App.) ("One such exception [to full faith and credit] is for judgments rendered in violation of the due process requirement that a defendant receive adequate notice and be given a meaningful opportunity to be heard."), *review denied*, 48 Wash.2d 1008 (1982), *cert. denied*, 461 U.S. 957 (1983).

the decisions of at least 31 other lower courts concerning plaintiffs' right to have Elwell testify despite the injunction. Seven appellate tribunals and 24 trial courts have permitted Elwell to testify as to non-privileged and non-trade-secret matters. *See* Addendum to Petition for Writ of Certiorari. For example, the California court of appeal explained, in the course of holding the Michigan injunction unenforceable in California, that:

> The Michigan injunction adversely affected petitioners' causes of action against GM by effectively destroying their ability to prove a substantial portion of their case. . . . Neither the petitioners nor their causes of action were subject to the jurisdiction of the Michigan court.

Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 25 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996). The Washington Court of Appeals similarly observed that, with respect to the Full Faith and Credit obligation, "[a] judgment cannot affect a stranger to the original lawsuit without violating procedural due process." *Worden v. General Motors Corp.*, Case No. 18127-4-II, slip op. 4 (Wash. App. May 20, 1994); *see also Head v. General Motors Corp.*, CA No. 6:95-3613-20, slip op. 2-3 (D.S.C. July 17, 1996) ("the Michigan injunction is not entitled to full faith and credit because Head was neither a party to nor in privity with a party to the prior proceeding in Michigan").

Indeed, prior to the decision below, no appellate court had ever barred Elwell from testifying at all. Now, however, the decision below, if allowed to stand, will be controlling law in the Eighth Circuit with respect to the Full Faith and Credit obligation.[7]

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[7] In a few questionable decisions, some trial courts have held that Elwell could not testify. App. 35a. But in any event, these decisions were rendered in readily distinguishable circumstances, as in instances where Elwell had

2. Another reason that the Michigan injunction is not entitled to Full Faith and Credit is that it is flatly inconsistent with "the ancient proposition of law" that "the public . . . has a right to every man's evidence." *United States v. Nixon*, 418 U.S. 693, 709 (1974) (internal quotation omitted); *see also Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996) (the "right to every man's evidence" is a "fundamental maxim" recognized "[f]or more than three centuries") (internal quotation omitted); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (maxim is a "fundamental principle" of law); *United States v. Mandujano*, 425 U.S. 564, 572 (1976) ("long accepted in America as a hornbook proposition"); *United States v. Burr*, 25 Fed. Cas. 38, 39 (No. 14,692e) (CC Va. 1807) (Marshall, Circuit Justice) ("[E]very person is compellable to bear testimony in a court of justice."). As early as 1562, persons having relevant knowledge were compelled by law in England to give evidence in court,[8] and in 1612 Lord Bacon observed that all subjects owed the King "their knowledge and discovery." *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (citing *Countess of Shrewsbury's Case*, 2 How. St.Tr. 769, 778 (1612)). Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the principle during the 1742 debate over the Bill to Indemnify Evidence, which would have granted immunity to witnesses against Sir Robert Walpole, first Earl of Oxford. *Jaffee*, 116 S. Ct. at 1928 n.8.

In short, what GM purported to purchase from Elwell — his silence even as to non-privileged matters — was not Elwell's to sell. Just as judicial precedents "are not merely the property of private litigants," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994) (internal quotation omitted), so too non-privileged knowledge may not simply be

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previously assisted GM's attorneys in preparing for the very *same* trial in which the plaintiff had sought to call him as a witness. *Id.* In *Harris v. General Motors Corp.*, No. 111342 (Super. Ct. Ventura Co., Calif.), for example, Elwell had been named, pretrial, as an expert witness *by GM*.

[8] *See* Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562).

bargained away. Rather, such information is subject to a public right of access in judicial proceedings. Otherwise, litigants could always enter into consent decrees with prospective adverse witnesses to prevent their testimony.[9]

Directly apposite here is this Court's decision in *Ex Parte Uppercu*, 239 U.S. 435 (1915) (Holmes, J.). There, the party seeking discovery had not participated in a prior case, in which a court had purported to seal all documents and thereby make them unavailable for evidence in other proceedings. In reversing a lower court's order denying petitioner leave to inspect the documents, this Court opined:

> The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, . . . Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it, however proper and effective the sealing may have been against the public at large . . . . As against the petitioner the order has no judicial character, but is simply an unauthorized exclusion of him by virtue of *de facto* power.

Id. at 440-41. Applying *Uppercu* to the very Michigan injunction involved here, a California court of appeals has explained that the Michigan decree cannot prevent third parties from obtaining Elwell's testimony:

> The principle expressed in *Ex Parte Uppercu* is directly

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[9] *Cf. EEOC v. Astra, USA, Inc.*, No. 96-1751, 1996 U.S. App. LEXIS 23355, *14-16 (1st. Cir. Sept. 6, 1996) (voiding agreements between employer and employees in which the latter committed not to cooperate with the EEOC).

> applicable here. The Michigan court had no jurisdiction over the petitioners, who had neither notice of nor opportunity to contest the issuance of the injunction, a decree obtained as a result of a purchased settlement in a completely unrelated case. Enforcement of the injunction would substantially impair the right of petitioners and others similarly situated to full acquisition of evidence necessary to prosecute their claims against GM without any possible legal redress. Just as in *Uppercu*, enforcement of the injunction against unrelated third parties who are not even remotely connected with the employment dispute between Elwell and GM would constitute acquiescence to an unauthorized exercise of de facto power. Bedrock constitutional principles mandating procedural fairness preclude such a result.

Smith v. Superior Court, 49 Cal. Rptr. 2d at 27.

3. A further reason for not giving the Michigan judgment binding effect is that it involved not a money judgment but an injunctive decree. This Court has never resolved the application of the Full Faith and Credit obligation in this context. As the Restatement (Second) of Conflict of Laws explains:

> The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act. No definite statement on the point is therefore made in the rule of this Section.

Restatement (Second) of Conflict of Laws § 102, comment c. The Restatement speculates that "[i]t may well be that the Supreme Court, when presented with the question, will hold that the enforcement of such decrees is required by full faith and

credit." *Id.* On the other hand:

> [I]n support of the view that the enforcement of such a sister State decree lies in the discretion of the forum is the argument made in § 449 of the original Restatement of this Subject that the granting or denying of equitable relief, other than an order for the payment of money, is a matter of discretion and that "[t]he decision by one court to give specific relief . . . will not limit another court and thus exclude the use of the discretion of the second court." Also the enforcement of a judgment ordering or enjoining the doing of an act might on occasion require continuing supervision by the enforcing court or be otherwise onerous.

Id.; *see also* 42 Am. Jur.2d Injunctions § 227 (citing cases holding that injunctions are not entitled to Full Faith and Credit); Michael Collins, Comment, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. 295, 397 n. 474 (1984) ("The Supreme Court has not ruled whether full faith and credit require the enforcement of another state's equitable decrees. State courts have typically assumed it does not."); Comment, *Developments in the Law— Injunctions*, 78 Harv. L. Rev. 994, 1044 (1965) (distinguishing money judgments from injunctions for Full Faith and Credit purposes).

There are in fact forceful reasons for greater reluctance to require one jurisdiction to honor an injunctive decree of another regardless of the second jurisdiction's substantive policies. An obligation to enforce a decree of another state's judiciary could end up requiring the second jurisdiction to use its supervisory and contempt powers to police an order that it might well have refused to enter in the first instance. Consider, for example, an order by State A compelling a factory operating and employing thousands of people in State B to stop what State A's courts deem to be a "pollution" of the air in State A. Requiring State

B's courts to enforce such an order raises concerns both about the extraterritorial application of state policy choices, *see BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1597 & n.16 (1996), and about "commandeer[ing]" state governmental units into the service of other sovereigns. *New York v. United States*, 505 U.S. 144, 161, 170, 173, 176 (1992) (citation omitted).

Indeed, the Michigan injunction itself illustrates the hazards of attempting to give binding effect to out-of-state injunctions. Numerous lower courts have permitted Mr. Elwell to testify as to non-privileged, non-trade-secrets information within his knowledge on the ground that the public policy of full discovery and disclosure demands such a result.[10] As one court reasoned in permitting Elwell to testify, "[p]ermanent injunctions entered in a sister state offer more potential for interference with the forum state's interests as a sovereign entity than do monetary judgments. Indeed, the permanent injunction at issue in this case affects the sovereign interests of Colorado in much the same way as would the application of a sister state's law." *Bray v. General*

[10] *See, e.g., Williams v. General Motors Corp.*, 147 F.R.D. 270, 273 (S.D. Ga. 1993) ("This Court concludes that the public interest — which must be weighed in any consideration of injunctive relief — is not served in this instance by prohibiting Elwell from testifying in Georgia as to matters not within the scope of an attorney-client or work-product privilege, or which divulgence would not constitute misappropriation of a trade secret. Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret information is outweighed by the public interest in full and fair discovery."); *Bishop v. General Motors Corp.*, No. 94-286-S, slip op. 2 (E.D. Okla. June 29, 1994) ("to the extent the Michigan injunction prohibits Elwell from testifying to matters outside the scope of any privilege, or with respect to trade secrets, it violates Oklahoma and federal court public policy of full discovery, [and] the Full Faith and Credit Clause does not require this court to give full effect to another state's judgment which clearly violates the public policy of full disclosure under both Oklahoma and federal law"); *Ruskin v. General Motors Corp.*, No. CV930073883, 1995 WL 41399, *2 (Conn. Super. Ct.) (Jan. 25, 1995) ("the Michigan injunction involves a blanket prohibition that contravenes Connecticut public policy and hence is not entitled to full faith and credit").

Motors Corp., No. 93-C-265, slip op. 5 (D. Colo. Jan. 20, 1995). *See also Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1996) ("neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction"). A California court of appeal explained that the injunction "not only violates our fundamental public policy against suppression of evidence," but also "would undermine the fundamental integrity of this state's judicial system." *Smith v. Superior Court*, 49 Cal. Rptr. 2d at 27.[11]

This Court has recognized that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *see also Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939) ("It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy.").

This principle demonstrates that the Full Faith and Credit obligation should not be deemed to extend to injunctive decrees, particularly the Michigan injunction enforced by the Eighth Circuit.

[11] Similarly, a federal district court in Arizona held that "Arizona public policy would be violated by enforcing the blanket prohibition of the Michigan injunction." *Hannah v. General Motors Corp.*, No. Civ 93-1368 PHX RCB, slip op. 4 (D. Ariz. May 30, 1996) (emphasis omitted). The injunction "prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth." *Id.* at 5; *see also Kibler v. General Motors Corp.*, No. C94-1494R, slip op. 2 (W.D. Wash. July 10, 1996) ("Washington's strong public policy in favor of full disclosure in the search for truth at trial outweighs the full faith and credit concerns").

Under Missouri public policy, a party should be provided "with access to anything that is 'relevant' to the proceedings and subject matter not protected by privilege." *State v. Koehr*, 831 S.W.2d 926, 927 (Mo. 1992) (en banc).

4. An additional reason for not according the Michigan judgment Full Faith and Credit is "the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here." *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964). This rule is premised on the general maxim that "state and federal courts would not *interfere with* or try to restrain each other's proceedings." *Id.* at 412 (emphasis added). And it does not matter whether an injunction is "addressed to the parties rather than to the federal court itself." *Id.* at 413; *see also General Atomic Co. v. Felter*, 434 U.S. 12, 17-18 (1977) (*per curiam*).

Here, of course, the *effect* of the Michigan injunction, as construed by the Eighth Circuit, is to bar petitioners from introducing Elwell's testimony in a federal court in Missouri. If a state court may enjoin federal court litigants in such a manner, then there is nothing to prevent a state court from barring parties in federal court from referring to specified documentary evidence; from prohibiting plaintiffs (or defendants) from asserting particular legal claims (or defenses); or otherwise from controlling federal court litigation. In short, the Eighth Circuit's decision would eviscerate the rule of *Donovan v. Dallas*, the purpose of which is to avoid "the difficulties that are the necessary result of an attempt to exercise [judicial] power over a party who is a litigant in another and independent forum." 377 U.S. at 413 (internal quotation omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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ADDENDUM

COURT DECISIONS ALLOWING ELWELL TESTIMONY

APPELLATE COURT DECISIONS:

1. *Carpenter v. General Motors Corp.*, Case No. 93-CA-1788-OA, (Ky. Ct. App. Sept. 20, 1993) (setting aside lower court order granting defendant General Motors Corporation's motion to quash plaintiff's motion to take out-of-state deposition of Ronald Elwell and granting plaintiff's motion to take deposition of Elwell).

2. *General Motors Corp. v. The Honorable Benjamin Euresti, Jr., Judge*, Case No. 94-1092 (Tex. Nov. 12, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus); *Correa v. General Motors Corp.*, No. 93-04-1704-A (Dist. Ct. Cameron Co. Sept. 22, 1994) (order granting plaintiffs' motion to depose Ronald Elwell).

3. *General Motors Corp. v. The Honorable J. Ray Gayle, III, Judge*, Case No. 94-1163 (Tex. Nov. 15, 1994) (overruling relator General Motors Corporation's motion for leave to file Petition for Writ of Mandamus and Motion for Emergency Stay); *General Motors Corporation, Relator v. The Honorable J. Ray Gayle, III, Judge, Respondent*, Case No. B14-94-01082-CV (Tex. Civ. App. Nov. 10, 1994) (denying relator General Motors Corporation's petition for leave to file petition for writ of mandamus and emergency motion to stay deposition of Ronald Elwell); Delarosa v. General Motors Corporation, et al., Case No. 90G2176; *Meche v. General Motors Corp.*, Case No. 91G1378; *Robinson v. General Motors Corp.*, Case No. 93G2052; *Heidaker v. General Motors Corp.*, Case No. 93G1357; *Norton (Daniel) v. General Motors Corp.*, Case No.

93M2036 (Dist. Ct. Brazoria Co. July 12, 1994) (granting plaintiffs' collective motions for deposition of Ronald Elwell); "Order on Motion of Rehearing and Motions to Permit Videotape Deposition of Ronald E. Elwell" (Aug. 8, 1994) (granting plaintiffs motions to permit videotape deposition of Elwell).

4. *General Motors Corp. v. The Honorable Robert Garza, Judge*, Case No. 94-0494 (Tex. June 29, 1994) (granting relator General Motors Corporation's motion to withdraw motion for leave to file petition for writ of mandamus (pursuant to settlement)); *General Motors Corp. v. The Honorable Robert Garza, Judge*, Cause No. 13-94-168-CV (Tex. Civ. App. May 3, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus) (rendered May 3, 1994); *Huerta v. General Motors Corp.*, Cause No. 93-12-7022-B (Dist. Ct. Cameron Co. Mar. 7, 1994) (granting plaintiff's motion to consult with and take the deposition of Ronald Elwell).

5. *Meenach v. General Motors Corp.*, 891 S.W.2d 398 (Ky. 1995) (holding that the lower court may modify the Michigan injunction to allow plaintiffs access to non-protected facts in the possession of Elwell).

6. *Smith v. Superior Court (General Motors Corp., Real Party in Interest); Stephens v. Superior Court (General Motors Corp., Real Party in Interest)*, 49 Cal.Rptr.2d 20 (Cal. App. 5th Dist. 1996) (granting plaintiffs' motions to obtain the testimony of Ronald Elwell).

7. *Worden v. General Motors Corp.*, Case No. 18127-4-II (Wash. App. May 20, 1994) (upholding trial court's order granting plaintiffs' motion for video deposition and/or trial testimony of Ronald Elwell and denying defendant's motion for protective order to prevent Elwell's testimony); *Worden v.*

General Motors Corp., Case No. 92-2-11770-9 (Sup. Ct. of Pierce Co. Mar. 11, 1994) (denying General Motors Corporation's motion for protective order to prevent testimony of Ronald Elwell and granting plaintiffs' motion for videotaped deposition and/or trial testimony of Elwell).

TRIAL COURT ORDERS:

8. *Anderson v. General Motors Corp.*, Case No. 342-160528-95 (Dist. Ct. Tarrant Co., Tex. Mar. 19, 1996) (granting plaintiffs' motion to obtain the testimony of Ronald Elwell and imposing conditional sanctions upon GM if it seeks and is denied mandamus relief).

9. *Bishop v. General Motors Corp.*, Case No. 94-286-S, (E.D. Okla. June 29, 1994) (denying General Motors' for protective order preventing the taking of Ronald Elwell's deposition).

10. *Bray v. General Motors Corp.*, Civil Action No. 93-C-2656 (D. Colo. Jan. 20, 1995) (granting plaintiff's motion to permit the deposition of Ronald Elwell).

11. *Colmenares v. General Motors Corp.*, Case No. BC004030 (Super. Ct. Los Angeles Co. Sept. 13, 1993) (denying General Motors Corporation's motion for protective order that deposition of Ronald Elwell not be taken) (entered September 13, 1993).

12. *Diaz v. General Motors Corp.*, Cause No. C-079-94-B, (Dist. Ct. Hidalgo Co. Aug. 31, 1994) (granting plaintiff's motion to take deposition of Ronald Elwell).

13. *Dixon v. General Motors Corp.*, Civil Action No. 2:94-CV-314PS (S. D. Miss. May 1, 1995) (granting plaintiffs' motion to call Ronald Elwell at trial and denying General Motors

Corporation's motion for protective order).

14. *Downen v. General Motors Corp.*, Case No. CIV 144604 (Super. Ct. Ventura Co., Calif. May 5, 1995) (granting plaintiff's motion to take videotaped deposition of Ronald E. Elwell).

15. *Gonzales v. General Motors Corp.*, CV-93-87-M-CCL (D. Mont. Feb. 14, 1995) (granting plaintiff's motion to take deposition of Ronald Elwell).

16. *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. May 29, 1996) (granting plaintiffs' motion to vacate and/or modify the Order regarding Elwell testimony and denying defendant's motion to strike Elwell from plaintiffs' witness list); *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. Feb. 4, 1996) (deferring ruling on defendant's motion to strike Elwell from plaintiff's witness list and preclude his testimony; allowing plaintiffs 90 days to petition the Michigan court for a modification of the permanent injunction).

17. *Head v. General Motors Corp.*, CA No. 6:95-3613-20 (D.S.C. July 17, 1996) (granting plaintiff's motion to allow Elwell to testify).

18. *Kibler v. General Motors Corp.*, No. C94-1494R (W.D. Wash. July 10, 1996) (denying defendant's motion to prevent Elwell from testifying as expert witness).

19. *Koval v. General Motors Corp.*, Case No. 137016 (Ct. Common Pleas, Cuyahoga Co., Ohio Aug. 28, 1992) (ordering that deposition of Ronald Elwell may proceed as noticed).

20. *Martin v. General Motors Corp.*, Case No. 92CIV0724 (Ct. Common Pleas, Medina Co., Ohio Oct. 21, 1994) (ordering that the deposition of Ronald Elwell be taken).

21. *Norton v. General Motors Corp.*, Case No 3:93-CV-62(W) (S) (S.D. Miss. Nov. 20, 1993) (granting plaintiffs' motion to take Elwell's deposition).

22. *Peoples v. General Motors Corp.*, Case No. CV 91-490J (Cir. Ct., Limestone Co., Ala. June 8, 1993) (denying General Motors' motion to quash plaintiff's deposition subpoena to Elwell).

23. *Pollan v. General Motors Corp.*, Case No. 92-47545 (Dist. Ct., Harris Co., Tex. Dec. 27, 1993) (denying General Motors' motion for reconsideration of order permitting deposition of Ron Elwell).

24. *Renze v. General Motors Corp./O'Connor v. General Motors Corp.*, LAW No. L93-2080 (Cir. Ct. of City of Va. Beach, Va. Apr. 14, 1995) (granting plaintiffs' motion to consult with and take the video deposition of Ronald Elwell and denying General Motors Corporation's motion for protective order prohibiting plaintiffs from taking the deposition of or consulting with Ronald Elwell) .

25. *Roberts v. General Motors Corp.*, Case No. E-12577 (Super. Ct. Fulton Co., Ga. Dec. 20, 1993) (granting plaintiff's motion for order permitting deposition of Ronald Elwell).

26. *Ruskin v. General Motors Corp.*, Case No. CV930073883, 1995 WL 41399 (Super. Ct., Litchfield, Conn. Jan. 25, 1995) (granting plaintiff's motion to take deposition of Elwell).

27. *Shaffer-Kleoppel v. General Motors Corp.*, Case No. 93-0498-CV-W-8 (W.D. Mo.) (granting plaintiff's motion to depose Ronald Elwell and ordering that deposition shall not be limited to factual testimony but may include opinion testimony).

28. *Shoemaker v. General Motors Corp.*, Case No. 91-0990-CV-W-8; *Baker v. General Motors Corp.*, Case No. 91-0991-CV-W-8, (W.D. Mo. June 18, 1993) (granting plaintiffs' motion to take videotape deposition of Ronald Elwell and denying General Motors' motion for protective order).

29. *Thompson v. GMC Truck Center*, Case No. BC045258 (Super. Ct. Los Angeles Co., Calif. Apr. 7, 1994) (permitting Ronald Elwell to testify at trial over defendant's contrary motion).

30. *Vasquez v. General Motors Corp.*, Case No. 223079, (Super. Ct. Kern Co., Calif. May 6, 1994) (granting plaintiff's motion for an order permitting testimony by expert Ronald Elwell).

31. *Williams v. General Motors Corporation*, 147 F.R.D. 270 (S.D. Ga. 1993) (granting plaintiffs' motion to depose Ronald Elwell).

APPENDIX A

Kenneth Lee Baker, et al., Appellees,

v.

General Motors Corporation, Appellant.

No. 95-1604 WMKC

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

July 25, 1996

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillian and Judge Loken took no part in the consideration or decision of this case.

July 25, 1996

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1604

Kenneth Lee Baker; Steven Robert Baker by next friend, Melissa Thomas, Appellees,	*
v.	* Appeal from the U.S. District Court for the Western District of Missouri
General Motors Corporation, Appellant.	*
The Product Liability Advisory Council, Inc., Amicus Curiae.	*

Submitted: January 8, 1996
Filed: June 14, 1996

Before BEAM, MORRIS SHEPPARD ARNOLD, Circuit Judges, and ALSOP,* District Judge.

BEAM, Circuit Judge.

In this products liability action, General Motors Corporation

* The HONORABLE DONALD D. ALSOP, United States District Judge for the District of Minnesota, sitting by designation.

(GM) appeals a jury verdict in favor of plaintiffs for 11.3 million dollars. GM argues that the district court erred in: (1) entering a discovery sanction against it; (2) instructing the jury on punitive damages; and (3) allowing a former GM employee to testify at deposition and trial. We reverse.

I. BACKGROUND

This case arose out of an automobile accident in which Gerald Shoemaker and Beverly Garner were killed. Shoemaker and Garner collided head-on with another car after which a fire broke out in the engine compartment of their vehicle. Garner's sons, Kenneth and Steven Baker, brought this products liability action alleging that the engine fire was caused by a faulty fuel pump in the Chevrolet S-10 Blazer in which their mother was riding and that this defect caused her death. GM asserted that the fuel pump was neither faulty nor the cause of the fire and that instead, Garner died as a result of collision impact injuries.

As in any products liability case, the cornerstone of the plaintiffs' case is the product's defect. To help prove that defect, the plaintiffs asked GM to produce its 1241 reports (1241 reports are essentially complaints from customers regarding GM products) involving similar accidents. GM represented that all 1241 reports were indexed in summary form in its central computer file. GM stated that its customary response to discovery requests was to produce these 1241summaries instead of the actual 1241 reports. From these summaries, plaintiffs could request the specific 1241 reports in which they were interested. Both the 1241 summaries and the reports proved difficult to obtain from GM and were the source of several discovery disputes during the months before trial.

On July 9, 1993, after several discovery stalemates, the district court issued an order which directed GM to produce "summaries of 1241 forms on non-collision under-hood electrical fires within 10 days" of the order. On July 20, GM produced a group of computer summaries, none predating 1988.

GM stated that pre-1988 reports were no longer available due to a five-year retention policy and that its production, therefore, amounted to full compliance with the July 9th order.

After learning from other plaintiffs' attorneys in other GM cases that they had received 1241 reports which were allegedly over five years old, the plaintiffs asked the district court to sanction GM for what they believed to be abuses in the discovery process. On August 2, GM explained that although there were several exceptions to its five-year retention policy, none of these exceptions had resulted in the retention of any 1241 reports (or summaries) over five years old which were relevant to this case.

A few days later, the plaintiffs found more 1241 reports over five years old in a National Highway Transportation Safety Administration (NHTSA) file. The file had been compiled by the NHTSA during one of its investigations into possible automobile defects. The plaintiffs then supplemented their request for sanctions against GM. This time, GM stated that it had never occurred to anyone to search the NHTSA files for older 1241 reports and cited the public availability of the reports to justify its lack of production. GM did, however, expand its records search at this time. Two days before trial, GM produced another five hundred 1241 reports, some of which duplicated those found in the NHTSA file. GM claimed, however, that few of these reports were responsive to the July 9th order. Following this production, the district court granted the plaintiffs' request for sanctions against GM.

Noting GM's continuing delay in the discovery process, the district court ordered GM's affirmative defenses stricken and further ordered that:

> the following matters, which relate to the substance of the July 9, 1993 order, shall be established for the purposes of this action:
> The 1985 Chevrolet S-10 Blazer at issue in this case was defective in that General Motors placed an electric fuel pump in the fuel tank without an adequate mechanism to shut off the pump in the event of a malfunction or collision and that General Motors has been aware of this defect and hazard for many years. The fuel pump in the 1985 Chevrolet S-10 Blazer in this case continued to operate after the engine stopped upon impact.

Baker v. General Motors Corp., 159 F.R.D. 519, 528 (W.D. Mo. 1994) (*Baker I*). The case proceeded to trial on the sole issue of whether the defect in the 1985 Chevy Blazer "directly caused or directly contributed to cause" the death of Beverly Garner. Trial Trans. at 1725.

At trial, the plaintiffs called former GM employee, Ronald Elwell, to testify.[1] Prior to trial, Elwell's testimony had been the subject of much debate. Elwell and GM had been involved in an earlier employment dispute which had led Elwell to sue GM for wrongful discharge. GM counterclaimed, alleging that in testifying for various plaintiffs (and against GM) in other products liability actions, Elwell was divulging privileged information. In settling the wrongful discharge claim, Elwell consented to a Michigan injunction which barred him from testifying against GM in products liability cases. GM and Elwell also entered into a settlement agreement[2] memorializing, among other things, their monetary settlement and GM's desire to prevent future damaging testimony by Elwell. The settlement agreement provided, in part, that if Elwell were ordered to testify by a court or other tribunal, he could do so without violating the settlement agreement.

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[1] For 15 of his 30 years of credited service with GM, Elwell was a member of GM's Engineering Analysis staff which studied the performance of GM vehicles, especially those involved in products liability litigation. Based on this experience, Elwell had assisted GM lawyers in defending products liability actions.

[2] Although the settlement agreement was sealed by the court below, we make use of the agreement to the extent necessary for our preparation of this opinion.

In this case, GM strenuously objected to both Elwell's deposition and trial testimony contending that Elwell's testimony was barred by the Michigan injunction. The plaintiffs countered that the Michigan injunction was not entitled to full faith and credit by the district court. Alternatively, they argued that even if the injunction were entitled to such credit, the settlement agreement allowed Elwell to testify. After in camera review of the Michigan injunction and the settlement agreement, the district court allowed the plaintiffs to depose Elwell and to call him as a witness at trial.

Elwell's trial testimony concerned his research on fuel-fed engine fires and the existence and contents of the "Ivey" document. The Ivey document is a value analysis document prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM and Oldsmobile officials. The Oldsmobile officials, according to Elwell's testimony, were at that time responsible for the overall fuel system design of GM vehicles. The document analyzed the potential expense of the loss of human life per vehicle due to fuel-fed engine fires. According to Elwell, the analysis implied that it would be worth only $ 2.40 per vehicle in operation for GM to prevent such fuel-fed fires.

At the end of trial, the district court incorporated its Rule 37 sanction language into the jury instructions. The district court also instructed the jury as to both compensatory and aggravating circumstance damages.[3] GM objected to the jury instructions,

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[3] The only explanatory damages instruction given, as to either type of damages, read in relevant part:

> In determining what amount would be fair and just compensation in this case you may consider the pecuniary losses suffered by reason of the death and the loss of companionship, comfort, instruction, guidance, counsel, training and support which decedent provided to Kenneth Baker and Steven Baker if any such loss or losses are found by you. In addition, you may award such damages as

arguing, inter alia, that the instructions gave the jury insufficient guidance in awarding what were essentially punitive damages.[4] GM also objected to the lack of differentiation between compensatory and punitive damages in the verdict form. Following trial, the jury awarded the plaintiffs 11.3 million dollars in damages, without apportioning between compensatory and aggravating circumstance damages.

II. DISCUSSION

A. The Discovery Sanction

GM argues that the district court abused its discretion in entering the discovery sanction. The district court has broad discretion in issuing sanctions for discovery abuse and its decision will be upheld absent an abuse of discretion. *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983) (citing *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975)). Our scope of review of the district court's actions is, therefore, very narrow. *Prow v. Medtronic, Inc.*, 770 F.2d 117, 122 (8th

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> Beverly Sue Garner may have suffered between the time of injury and the time of death and for the recovery of which the deceased may have maintained an action had death not ensued. You may consider any mitigating or aggravating circumstances attendant upon the death if you find any such circumstances. You may not consider grief and bereavement by reason of the death.

Trial Trans. at 1727.

[4] GM's objections included the following claims: (1) there was inadequate evidence to support the submission of an aggravating circumstance damages instruction to the jury; (2) the lack of evidence of aggravating circumstance damages denied GM the opportunity to defend against such damages; (3) the jury was given insufficient standards for imposing aggravating circumstance damages through vague and unconstitutional instructions; and (4) the failure to apportion between compensatory and aggravating circumstance damages was error.

Cir. 1985).

We must first determine whether the district court was correct in finding a discovery violation to support its imposition of the sanction under Federal Rule of Civil Procedure 37 (Rule 37). To impose Rule 37 sanctions, there must be: (1) a court order compelling discovery; (2) a violation of that order which is wilful;[5] and (3) prejudice to the other party from the violation. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1330 (8th Cir. 1986); *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977). In this case, all of these elements were present.

The July 9th order satisfies the first requirement, that there be a discovery order in place. GM failed to fully comply with the order within the ten-day required period, as evidenced by its further production of 1241 reports in early August, just prior to trial.[6] The district court's finding of prejudice is supported by

[5] Severe sanctions, such as that entered here, are often reserved for wilful or bad faith violations of court orders. *Societe Int'l v. Rogers*, 357 U.S. 197, 212 (1958). This court has determined, however, that a "deliberate default" will suffice. *Anderson*, 724 F.2d at 84 (citing *Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1208 (8th Cir. 1983) (deliberateness includes failure to respond to discovery requests and failure to provide full information following a court order)). In any event, we agree with the district court's conclusion that GM's noncompliance was both deliberate and wilful. *Baker I*, 159 F.R.D. at 524.

[6] GM argues that the July 9th order only required production of computer summaries of 1241 reports. The district court seemed to share that belief. *Baker I*, 159 F.R.D. at 524. However, the express words of the order made no such limitation. GM further argues that it only needed to produce the summaries found on its central computer file, because the district court and the plaintiffs understood that to be GM's customary discovery response technique. Again, the discovery order contains no such limitation. Furthermore, as the district court explained, the order "referred only to computer summaries because defendant's counsel represented to the Court that all 1241's that General Motors could produce in hard copy were indexed on the computer database." *Id.* This assurance was, at best, inaccurate. Consequently, GM cannot now rely on its own interpretation of the discovery order's limiting language which was employed largely because of its own misrepresentations. Similarly, GM cannot feign compliance with the discovery order by producing the actual 1241 reports, instead of the

the produced documents themselves. GM's late production of the 1241 reports prevented the plaintiffs from researching them completely, essentially depriving them of the information which they were due. GM's conduct, therefore, clearly justified the imposition of Rule 37 sanctions. However, this conclusion does not end our inquiry. We must determine whether the sanction imposed was just and specifically related to the claim at issue in the discovery order. *See* Fed. R. Civ. P. 37(b)(2); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). In this case, we do not believe the sanction met that standard.

As this court has stated previously, "there is a strong policy favoring a trial on the merits and against depriving a party of his day in court." *Fox*, 516 F.2d at 996. The sanction in this case failed to achieve a balance between the policies of preventing discovery delays and deciding cases on the merits. Such a balance recognizes that the opportunity to be heard is a litigant's "most precious right and should be sparingly denied." *Edgar*, 548 F.2d at 773. GM was not given the right to be heard. Instead, the jury was asked, essentially, to place a monetary value on the loss of human life. Before issuing such a sanction, fairness required the court to consider whether a more "just and effective" sanction was available. *Id.* In this situation, other, less

summaries as directed by the order.

GM apparently wants this court to overturn the district court's factual findings leading up to the imposition of sanctions. This, we refuse to do. *See generally Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993) (both sanction imposed under court's inherent authority and factual basis for sanction are reviewed under abuse of discretion standard); *Laclede Gas Co. v. G.W. Warnecke Corp.*, 604 F.2d 561, 565 (8th Cir. 1979) (party subject to sanction for violating letter and spirit of discovery rules as well as court's pretrial orders). GM cannot take a limited view of its duty to comply with discovery requests simply because it is customary for it to do so. GM was ordered to produce the summaries because they were supposed to lead to the production of all available 1241 reports. Because GM's assurance failed, so does its interpretation of the discovery order.

severe sanctions (including monetary fines against GM and continuances for the plaintiffs) were both available and appropriate.

While we do not condone GM's failure to meet its discovery obligations, we find that the sanction chosen by the district court was simply too severe for the facts presented and should have been drawn more narrowly. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979). By providing that the fuel pump was defective and continued to operate here, the sanction forced the jury to find for the plaintiffs. Although the case ostensibly proceeded to trial on the issue whether the defect "directly caused or directly contributed to cause" Garner's death, in effect, the jury instructions had already decided the matter for the jury. Because the district court abused its discretion in entering such a broad sanction, we reverse for imposition of a lesser sanction and for a new trial.

B. The Aggravating Circumstance Instruction

GM also argues that aggravating circumstance damages under Missouri law are in fact punitive damages and that it was subjected to such damages without the procedural safeguards required by *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Because we reverse on the issue of liability, we must vacate the award of damages. However, we address this issue to avoid error on retrial.[7]

Pursuant to the Missouri Supreme Court's recent decision in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995), there is no question that Missouri's aggravating

[7] In so doing, we acknowledge the United States Supreme Court's recent decision in *BMW of North America, Inc. v. Gore*, 1996 WL 262429 (U.S. 1996) (reversing "grossly excessive" punitive damages award as violative of Fourteenth Amendment's Due Process Clause). Although that decision does not affect this analysis, the district court may wish to consider its teachings on remand.

circumstance damages are to be treated as punitive damages. The Missouri Supreme Court not only equated aggravating circumstance and punitive damages, but further stated, "at least since 1979, the damages attributed to 'aggravating circumstances' necessarily refers only to punitive damages." *Id.* at 466. In other words, Bennett did not signal a change in the law, but merely clarified the law as it had existed for quite some time in Missouri.[8] As the Bennett court stated, "because aggravating circumstance damages are punitive in nature, they may only be awarded if accompanied by the due process safeguards as articulated in Haslip." *Bennett*, 896 S.W.2d at 466. Consequently, we must examine whether the *Haslip* safeguards were met in this instance.

In *Haslip*, the United States Supreme Court held that the traditional means[9] of awarding punitive damages did not per se

[8] Consequently, we find the appellees' argument that Bennett should only be given prospective application unavailing. Even if we found that Bennett announced a new principle of law, which we do not, we would apply the Bennett decision retroactively. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Elliot v. Kesler*, 799 S.W.2d 97, 102 (Mo. Ct. App. 1990). Under Chevron, a decision is to be given prospective application only if: (1) it established a new principle of law; (2) its retroactive application would retard its operation; and (3) its retroactive application would produce inequitable results. *Chevron*, 404 U.S. at 106-07. In this case, we find that prospective application of *Bennett* would produce inequitable results. The United States Supreme Court's decision in *Haslip*, with which the instructions in this case failed to comply, preceded, by two years, the trial of this case. *Haslip*, 499 U.S. at 1. To approve of, in hindsight, proceedings which were clearly in violation of Supreme Court precedent at the time of their occurrence, would be inequitable. Furthermore, we find, as would Missouri courts, that because Bennett clarified applicable substantive law, not merely procedural law, it should be given retroactive effect. *See Dietz v. Humphreys*, 507 S.W.2d 389, 392 (Mo. 1974); *Prayson v. Kansas City Power & Light Co.*, 847 S.W.2d 852, 854 (Mo Ct. App. 1992), *cert. denied*, 114 S. Ct. 95 (1993).

[9] "Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it

violate the Due Process Clause of the United States Constitution. 499 U.S. at 15. However, the Court cautioned that "unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18. The Court further stated that factfinders "must be guided by more than the defendant's net worth" in making such awards. *Id.* at 22. In *Haslip*, such guidance included: (1) jury instructions which adequately informed the jury as to the purpose of punitive damages — to punish the wrongdoer and to protect the public from similar future harms; (2) post-trial procedures in which the trial court scrutinized punitive damages awards; and (3) state supreme court review, including a comparative analysis, to ensure awards were "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 19, 20, 21.

In this case, there was neither any guidance for the jury nor any restraint on its discretion in awarding punitive damages. Instead, the jury was allowed to award aggravating circumstance damages without being given a definition of what those damages entailed. This lack of guidance rendered the jury instructions unconstitutionally vague and violated GM's right to due process. *See Bennett*, 896 S.W.2d at 466.

The jury also did not apportion its damages award between compensatory and punitive damages, as required by *Bennett*. Trial Trans. at 1706. This resulted in a lump sum award of 11.3 million dollars. As GM stated in its objection to the lack of division, "the defendant under these circumstances can be punished without knowing what the punishment is since the damages are one figure." Trial Trans. at 1705-06. Because there is no way to compare the punitive and compensatory damages awards, GM has effectively been denied its right to trial court and appellate court review of the punitive damages award.

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is reasonable." *Haslip*, 499 U.S. at 15.

Therefore, the damages award was defective.

C. The Michigan Injunction

The constitutional full faith and credit principle requires that federal courts give the same faith and credit to a state court judgment as would the state court in which it was rendered. U.S. Const. Art. IV § 1; 28 U.S.C. § 1738. *See also Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996). GM asserts that the district court violated this principle in allowing the plaintiffs to take Ronald Elwell's deposition and in allowing him to testify at trial. GM argues that the district court should instead have given full faith and credit to the Michigan injunction barring Elwell's testimony. Because the district court's decision to not extend the injunction full faith and credit involves a question of law, we review it de novo. *See In re Garner*, 56 F.3d 677, 679 (5th Cir. 1995); *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 712 (9th Cir. 1992).

The district court refused to give the Michigan injunction full faith and credit because it believed: (1) a "public policy" exception to full faith and credit allowed Elwell's testimony, and (2) full faith and credit implies the *same* faith and credit; therefore, an injunction which is modifiable in Michigan is modifiable in Missouri. We first address the district court's reliance on a "public policy" exception to full faith and credit. The district court found that the Michigan injunction violated Missouri's public policy, as evidenced by Missouri's Rules of Civil Procedure, which favors full disclosure of all nonprivileged, relevant information. *See, e.g.*, Mo. R. Civ. P. 56. Because the Michigan injunction bars Elwell from testifying even as to nonprivileged information, the district court refused to extend full faith and credit to the injunction. Assuming, arguendo, that a public policy exception to the full faith and

credit command exists,[10] we conclude that the district court improperly relied on such an exception in this case because of Missouri's equally strong public policy in favor of full faith and credit.

Missouri public policy embraces the theory of full faith and credit, as evidenced by the references to it in the state's statutes. *See, e.g.*, Mo. Rev. Stat. §§ 511.760; 511.778. Missouri case law also contains numerous discussions of the importance of the full faith and credit requirement. *See, e.g., Roseberry v. Crump*, 345 S.W.2d 117, 119 (Mo. 1961); *In re Veach*, 365 Mo. 776, 287 S.W.2d 753, 759 (Mo. 1956); *Bastian v. Tuttle*, 606 S.W.2d 808, 809 (Mo. Ct. App. 1980); *Corning Truck & Radiator Serv. v. J.W.M., Inc.*, 542 S.W.2d 520, 524 (Mo. Ct. App. 1976). Under this doctrine, Missouri courts must give full faith and credit to judgments of sister state courts "unless it can be shown that there was lack of jurisdiction over the subject matter, failure to give due notice, or fraud in concoction of the judgment." *Bastian*, 606 S.W.2d at 809. No such allegations have been made in this case. It is therefore difficult to see how Missouri's public policy is any less supportive of full faith and credit than it is of full and fair discovery. Consequently, the district court incorrectly used Missouri's interest in full and fair discovery to override its interest in giving full faith and credit to a sister state's judgment.

The district court's reliance on the modification argument is also problematic. The district court found that the injunction was subject to modification in Michigan. It then held that because the injunction was modifiable in Michigan it need not be given full faith and credit in Missouri, but only the *same* faith and credit as given by the issuing state's court. U.S. Const. Art. IV § 1; 28 U.S.C. § 1738. *See also Matsushita*, 116 S. Ct. at 877.

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[10] In so doing, we acknowledge the contrary authority cited by the appellant on this issue. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); Restatement (Second) of Conflict of Laws § 117 (1971) (sister state judgment recognized in other state regardless of the fact that bringing the original action in the recognizing state would offend that state's public policy).

However, the mere fact that an injunction remains subject to modification in one state does not render it unworthy of full faith and credit in another. *See* Restatement (Second) of Conflict of Laws § 109 (1988 revisions) (judgment entitled to full faith and credit despite fact that it remains modifiable in rendering state).

The full faith and credit clause "is not so weak that it can be evaded by mere mention" of the word "modification." *Howlett v. Rose*, 496 U.S. 356, 383 (1990). This is especially true on facts such as those presented here. First of all, although the appellees claim that the injunction may be modified by the Michigan court, they presented no evidence that they requested a modification from that court. Secondly, although it has been asked on several occasions to modify the injunction, the Michigan court has yet to do so. Thirdly, the district court found that Michigan law required a change in circumstances to warrant modification of the injunction, *see, e.g., First Protestant Reformed Church v. De Wolf*, 100 N.W.2d 254, 257 (Mich. 1960), but further found that there had been no "classical" change in circumstances between GM and Elwell in this case. Therefore, appellees have simply not presented sufficient evidence to show that the Michigan court would modify this injunction.

To avoid its finding of unchanged circumstances, the district court emphasized the importance of other interests, such as the discovery rights of litigants, of which it believed the Michigan court was unaware when it entered the injunction.[11] *Baker ex rel.*

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[11] The district court also attached some significance to the fact that the GM/Elwell settlement agreement allowed Elwell to testify, without violating its terms, when ordered to do so by a court of competent jurisdiction. The settlement agreement provides, in relevant part: It is agreed that [Elwell's] appearance and testimony, if any, at hearings on Motions to quash subpoena or at deposition or trial or other official proceeding, if the Court or other tribunal so orders, will in no way form a basis for an action in violation of the Permanent Injunction or this Agreement. Settlement Agreement at 10. This language merely shows GM's concession that some courts might fail to extend full faith and credit to the injunction.

Cress v. General Motors Corp., No. 91-0991 (W.D. Mo. June 18, 1993) (reproduced in Addendum to Appellant's Brief at 11). We find no evidence in the record to support such a statement. A stipulation in which GM expressly approved of Elwell's testimony in another case then pending was executed concurrently with the injunction. The Michigan court was, therefore, aware of the existence of at least some other parties' interests. The district court also would have assumed, as did the parties, that other similar litigation would follow; the injunction would otherwise have been unnecessary. Consequently, we find that the appellees failed to establish that the Michigan injunction was not entitled to full faith and credit.

III. CONCLUSION

Because the district court erred in entering a Rule 37 sanction that was too severe and in allowing Elwell to testify, we reverse and remand to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

AIMEE SHOEMAKER and JESSICA SHOEMAKER, By Next Friend, Amanda Embree,	)	
Plaintiffs,	)	
v.	)	No. 91-0990-CV-W-8
GENERAL MOTORS CORPORATION,	)	
Defendant.	)	
KENNETH BAKER and STEVEN BAKER, By Next Friend, Shirley Cress,	)	
Plaintiffs,	)	
v.	)	No. 91-0991-CV-W-8
GENERAL MOTORS CORPORATION,	)	
Defendant.	)	

ORDER

This matter is before the Court on plaintiffs' motion pursuant to Fed. R. Civ. P. 30(b)(9) to permit videotape recording of the

deposition of Ronald E. Elwell. Plaintiffs wish to depose Elwell as a fact witness in this case. Defendant General Motors (G.M.) objects to the deposition because of an injunction entered into by stipulation in a previous case by Circuit Court of Wayne County, Michigan. G.M. claims that the deposition may disclose attorney-client confidences, attorney work product or other confidential information, all of which it claims are protected by the Michigan injunction.

The Facts

Ronald E. Elwell was an employee of G.M. from July 1959 until July 1989. In 1971, Elwell was assigned to the Engineering Analysis Group. As a member of that group, Elwell worked with both G.M.'s legal staff and outside counsel in preparing defenses against product liability suits. Elwell concentrated in the area of fuel systems and fuel-fed fires. In the performance of his job, Elwell worked with G.M.'s lawyers in a number of ways: testifying as an expert witness, consulting with engineers on liability issues, preparing demonstrative evidence, participating in litigation strategy planning and helping to respond to discovery requests. In addition, Elwell was named, on numerous occasions, as the corporate employee who was most knowledgeable about certain topics pursuant to Fed. R. Civ. P. 30(b)(6). None of this work was specifically done in connection with the instant case.

In addition to his litigation-related duties, Elwell did research with the engineering analysis group, reviewed relevant legislation, reviewed literature on vehicle performance, and advised the advertising staff regarding product use. During his assignment to the litigation group, he dedicated his time to researching and studying about vehicular fires. He used this experience to improve the performance of existing and future G.M. products, including suggesting changes in G.M. fuel line designs.

There is no doubt that in his important role, Elwell had access

to, and participated in creating, many items involving attorney work product, attorney-client communication, or G.M. proprietary information.

Elwell served in this capacity until his relations with the company soured in 1987. He reached an agreement with G.M. whereby he would be placed on "unassigned" status with pay without maintaining a regular work schedule. He was occasionally retained as a consultant by G.M. and others whose interests were not contrary to G.M.'s. The agreement called for Elwell to continue with the "unassigned" status until July 1989, at which time he was to retire with 30 years of credited service.

When the time came for Elwell to retire in July 1989, Elwell and G.M. became involved in another disagreement, and Elwell did not complete the paperwork necessary to finalize his retirement. In June 1991, Elwell sued G.M. in the Circuit Court of Wayne County, Michigan, alleging wrongful discharge and breach of contract, and interference with business relationships. G.M. counterclaimed, alleging that Elwell had breached a fiduciary duty owed to G.M. and that he had misappropriated and wrongfully disclosed privileged and confidential information.

While Elwell's case against G.M. was pending in Michigan, he was enlisted by the plaintiffs in Mosely v. General Motors, a products liability action pending in a federal district court in Georgia. He was deposed twice and in the course of the depositions, at the instance of G.M., he produced five banker boxes full of documents, many of which were claimed to by privileged by G.M.

On November 22, 1991, the Michigan court issued a preliminary injunction against Elwell. The injunction prohibited Elwell from

> consulting or discussing with or disclosing to any person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation whether already filed or

filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employment with General Motors Corporation.

Attached to defendants suggestions in opposition as Exhibit "C." In August 1992, Elwell and General Motors settled their claims and signed a stipulation which states Elwell's consent to the entry of a permanent injunction. The permanent injunction referenced in the stipulation was entered on August 26, 1992 by the Circuit Court of Wayne County, Michigan.

The permanent injunction reads as follows:

> Upon reading and filing of General Motors Corporation's Motion for Preliminary Injunction and supporting pleadings, the transcripts of September 13, 1991 and October 29, 1991, and for all the reasons stated on the record and in the Preliminary Injunction entered on November 22, 1991, and after consideration of the Stipulation between the parties, the Court finds and Orders as follows:
>
> General Motors Corporation has met the requirements for permanent injunctive relief. Specifically, General Motors Corporation has met its burden in establishing that if Plaintiff disclosed various forms of privileged information he possesses General Motors Corporation would be irreparably harmed. Second, General Motors Corporation has established its burden of showing that its remedy at law is inadequate. Third, General Motors Corporation has established that the public interest weighs in favor of granting a permanent injunction.
>
> Therefore, IT IS HEREBY ORDERED that Ronald E. Elwell BE AND HEREBY IS, ENJOINED from: (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors

> Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment General Motors Corporation; and (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial as an expert witness, or a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of the Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

Attached to defendant's suggestions in opposition as "Exhibit D."

Pursuant to the proviso of the Michigan court, Elwell proceeded to testify for the plaintiff and against G.M. in the Mosely case in Georgia. Subsequently the jury found for the plaintiff and assessed total damages, including both compensatory and punitive damages, at $105.5 million. Elwell's testimony played an important part in the Mosely case.

With this review of the background of this dispute, the Court turns to the present case. It consists of two lawsuits[1] arising out of a car crash where a Chevy Blazer was hit head on and burst into flames. The driver and adult front seat passenger of the Blazer were killed. The driver died as a result of trauma from the collision, but plaintiffs allege that the passenger survived the impact and died as a result of the fire. The children of the

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[1] The lawsuits were originally filed separately, then consolidated by this Court, and recently severed for trial.

passenger bring this wrongful death action against G.M. alleging defective fuel line design. The children of the driver are suing for defective design of the seat belt, steering wheel and steering column.

The parties agree that Elwell is an expert on G.M. fuel systems, including the design history, fuel system safety, design decision-making and subsequent alternative designs. These are the areas into which plaintiffs wish to inquire. Plaintiffs state that they do not seek information that is specific or has been the subject or has been the subject of litigation about which Elwell has conferred with G.M.'s lawyers, thus making the information subject to the attorney-client privilege, attorney work product privilege, or confidential. Rather, they say, they seek to depose Elwell as a "fact witness."

The question before the Court is two-fold: first, may the Court order the deposition of Elwell and would such an order be impermissibly in contravention of the Michigan permanent injunction; and second, if the injunction does not prevent this Court from authorizing the deposition, do the attorney-client and attorney work product privileges so infect his knowledge and therefore constrain inquiry so as to render the taking of his deposition impracticable.

Full Faith and Credit

The Court will assume for the purposes of this first part of its analysis that in the deposition sough[t] here that Elwell will not be asked to testify regarding any information that is prohibited under the part (1) of the Michigan injunction that prevents Elwell from revealing confidential information. Instead, the Court will address its inquiry to the second part of the injunction that prevents Elwell from testifying in any case brought against G.M. involving a product with which Elwell worked.

Our first analysis inquired whether the Full Faith and Credit clause of the Constitution requires this Court to be bound by the injunction of the Michigan Court.

The Full Faith and Credit clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other state." U.S. Constitution, Art. IV, § 1. That clause has be codified by Congress to read: "[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.

The Supreme Court has never held that the Full Faith and Credit Clause demands unequivocal, unquestioning recognition of every foreign jurisdiction's judgment. Instead, the Court has articulated several important caveats. First, a judgment shall only be accorded the credit, validity and effect that would be given it by the state in which it was entered. Underwriters Nat'l Ass. Co. v. North Carolina Life and Accident and Health Ins. Assoc., 102 S. Ct. 1357, 1365 (1982); 28 U.S.C. § 1738. Second, "a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first state had power to pass on the merits — had jurisdiction, that is, to render judgment." Id. at 1366 (citing Durfee v. Duke, 84 S. Ct. 242, 244 (1963)).

The last caveat is that, in certain circumstances, a judgment of a foreign jurisdiction need not be enforced by a the court of a sister state when the judgment is contrary to the public policy of that sister state. In Pacific Ins. Co. v. Industrial Accident Comm'n, 59 S. Ct. 629, 633 (1939), the Court stated: "[i]t has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the Full Faith and Credit Clause to enforce even the judgment of another state in contravention of its own statutes or policy." Id.

The Court finds two of these caveats applicable in this case, each of which is sufficient to preclude the application of the Full Faith and Credit clause to the Michigan injunction. The public policy exception to the Full Faith and Credit clause and the

requirement that a judgment be given the same effect and force as given in the issuing state will be addressed in turn.

The public policy exception to the Full Faith and Credit clause was used to allow Elwell to testify in Williams v. General Motors, No. CV392-037 (S.D. Ga.), a case involving a Chevy S-10 Blazer and allegations of seat belt defects. Williams represents the only written, well-supported rationale for any decision about the Elwell injunction.[2] The issue of Elwell's deposition was before the district judge there after a magistrate enforced the injunction and refused to let Mr. Elwell be deposed. The Williams court held that there is a public policy exception to the Full Faith and Credit clause as outlined in Nevada v. Hall, 440 U.S. 410, 420, 422 (1979).[3] The judge reasoned that Georgia law afforded protection to all items covered in part one of the injunction: attorney-client privilege, attorney work product, and trade secrets. However, the Court found that the second part of the injunction prevented Elwell from giving any testimony in cases against G.M. and that this prohibition was clearly outside of Georgia's narrow construction of statutory privileges. The Court held that part two of the injunction violates Georgia public policy and is of no effect in Georgia.

This Court subscribes to the reasoning of the William court. As will [be] discussed later, the Court cannot say that everything that Elwell might say is a deposition is privileged or otherwise confidential. Instead, much of what Elwell might say could be unprivileged, potentially relevant or designed to lead to the

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[2] The Williams court entered an order on March 5, 1993, that permitted the deposition of Mr. Elwell. G.M. is appealing this decision. See Notice of Appeal dated April 5, 1993, attached to defendant's suggestions in opposition as "Exhibit G."

[3] Defendant argues that Nevada v. Hall is inapplicable because it dealt with very specialized child custody laws. While defendants may be correct that Nevada v. Hall is not the best case to use as controlling authority, the Court believes that the principle as it is outlined in Pacific Insurance is of more general application.

discovery of relevant evidence, and therefore, discoverable. To prevent the disclosure of this information would be against the public policy of the State of Missouri.

Similar to the Federal jurisdiction, Missouri has abandoned the old school of ambush and surprise litigation tactics, and instead has adopted a comprehensive set of discovery rules and practices in order to make the discovery process more fair:

> The general provisions governing discovery are described in Rule 56. The purposes of discovery are to eliminate concealment and surprise, to aid litigants in determining facts prior to trial, and to provide litigants with access to proper information with which to develop their respective contentions and to present their respective sides on issues framed by the pleadings. State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo. Ct. App. 1985). The rules of discovery are also designed and interpreted to aid the court. Bethell v. Porter, 595 S.W.2d 369, 377 (Mo. Ct. App. 1980). Discovery is a search for facts, in testimony and in documents or other things, within the exclusive knowledge of possession of one party in anticipation of litigating a pending action in court. 27 C.J.S. Discovery § 1.

J.B.C. v. S.H.C., 719 S.W.2d 866, 869 (Mo. Ct. App. 1986). Furthermore, "[c]ourts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and provide a party with access to anything that is "relevant" to the proceedings and subject matter not protected by privilege. State ex rel. Plank v. Koehr, 831 S.W.2d 926, 927 (Mo. banc 1992).

Certainly this Court recognizes G.M.'s right to prevent disclosure of attorney-client, attorney work product, and confidential information, but the broad ban against testifying sought by G.M. here silences much other relevant, discoverable information. As a member of the Engineering Analysis staff,

Elwell "monitor[ed] and studie[d] the performance of General Motors' vehicles in the hands of G.M. customers, including specifically G.M. vehicles involved in collisions giving rise to products liability lawsuits." Affidavit of Maynard L. Timm, at 2, attached to defendant's suggestions as Exhibit B. While Elwell undoubtedly performed litigation-related duties, Timm's affidavit clearly shows that he had responsibilities for many other distinct roles, some of which were unrelated to litigation. In those roles, it is probable that Elwell was involved in researching and improving the safety performance of vehicles. To prevent this information from being disclosed simply because Elwell also worked with lawyers is a fatally overbroad application of the Michigan injunction.

By not allowing Elwell to speak about his knowledge of G.M. products amounts to concealments of relevant evidence. An injunction that prevents the full and flair discovery of nonprivileged information held by a former employee is against Missouri's policies favoring broad discovery.

The public interest would be severely compromised if injunctions of this sort were entered as a matter of course. After reviewing the settlement agreement between Elwell and G.M. that was provided to the Court in camera, the Court believes that Elwell's cooperation with the injunction was bought for an undisclosed sum of money as one of the terms of the settlement of his claims against G.M. The agreement supplied to the Court states that "[t]he parties agree to execute the attached Stipulation and to enter the attached Order Dismissing Plaintiff's Complaint and Granting Permanent Injunction." Settlement Agreement, at 9. The same is stated in the Stipulation entered into between the parties in settlement of Elwell's claims. Stipulation, at ¶ 29.

The Court's perception of those agreements is that G.M. bought Elwell's silence on any matters that could be damaging to G.M.'s interest. Under the injunction, G.M. has not only prevented Elwell from speaking on his own behalf, but no one else may find out what he knows, effectively blockading a litigant's search for the truth and for redress. While G.M. is free

to pay Elwell for his voluntary silence, this Court holds that G.M. may not pay Elwell to keep others from finding out what he knows.

The ultimate effect of allowing such an arrangement is that a company could do all its safety testing and research under the guise of the litigation department. That would cloak all such information and all research employees with the protective shield of attorney-client and attorney work product privileges. Invocation of that privilege would then shut off all discovery of the company's knowledge of the safety of its products or its efforts to improve them. Such a system promotes secrecy and concealment and is clearly contradictory to the current policies of candor and full and fair discovery.

The public policy exception is not the only reason the Michigan injunction should not be followed in this case. This Court is not required to give full unbounded effect to an injunction entered by a court in a foreign jurisdiction. Rather, the court need only give it the credit, validity and effect that it would receive in the state in which it was entered. Underwriters Nat'l Ass. Co. v. North Carolina Life and Accident and Health Ins. Assoc., 102 S. Ct. 1357, 1365 (1982); 28 U.S.C. § 1738. The Court, therefore, turns to Michigan law to determine the finality which is accorded to a permanent injunction. "A continuing decree of injunction directed to events to come is subject always to adaption as events may shape the need." Elliot v. A.J. Smith Contracting Co., 100 N.W.2d 254, 257 (Mich. 1960) (quoting United States v. Swift & Co., 52 S. Ct. 460, 462). The power to modify an injunction does not depend on a specific court rule; rather, it is inherent in the Court's equity powers. Wayne Creamery v. Suyak, 158 N.W.2d 825, 831 & n.14 (Mich. Ct. App. 1968).

The Court finds that current events do "shape the need" to modify this injunction. The Michigan Court's injunction addressed the need to prevent Elwell from disclosing confidential information. However, from what the Court knows of Elwell's testimony in the Moseley case, it is clear that the overbroad

injunction has prevented the disclosure of not only privileged information, but much discoverable information as well. Unlike a traditional injunction situation, this injunction established not only the rights of the parties before the Michigan Court where the case in which it was entered was pending (i.e. Elwell, G.M. and engineer Bill Chicowski), but, if defendant were to prevail here, forever defined the rights of innocent third parties who have a keen interest in the information which Elwell holds.

The Court admits that there is no classical "change in circumstances" between the parties. Instead, the change that merits a revisiting of the injunction is the fact that other parties, not before the ordering court, have presented interests that were not known to the Michigan court at the time the injunction was entered. In this sense, there is a change in circumstances that requires that the injunction be revisited to determine whether justice requires a modification in the injunction's terms.

Michigan case law suggests that the rights of third parties under injunctions are important interests to be weighed by the courts, especially in the context of covenants not to compete:

> The overbreadth of an injunction also affects customers by denying them the opportunity to deal with defendants. The rights of innocent third parties should not be sacrificed in formulating a remedy, especially since the plaintiff's right to relief is based on the fiduciary relationship between the employer and employee. Although the plaintiff's trade secrets should be protected, innocent third parties, to the extent possible, should be left unaffected by the dispute between the former employer and the former employee.

Hayes-Albion v. Kuberski, 364 N.W.2d 609, 617 (Mich. 1984). This opinion by the Michigan Supreme Court supports the conclusion that this Court has a duty in this circumstance to consider the rights of third parties under a previously-entered injunction. The Court finds that the Elwell injunction severely

affects innocent third parties and their ability to conduct full and fair discovery in their efforts to seek compensation for injury allegedly caused by G.M.'s defective product. Therefore, this Court is not bound by the Full Faith and Credit clause and may revisit and modify the Michigan injunction to address third parties' needs.

Defendant argues that the Michigan Court has been given the chance to reevaluate the effect of its injunction, but three times has refused to re-open the permanent injunction. One was a motion by Elwell himself to clarify the induction, one was a motion to clarify by the Detroit News, and the third was a motion to intervene by NBC.[4] See defendant's attached exhibits H, I, J.

The actions of the Michigan Court may be relevant to the finality of the injunction, and whether rights of third parties have been considered. However, the injunction has never been challenged in the Michigan Court by a third party requesting discovery. In any case, this Court finds that circumstances have changed sufficiently to allow the injunction to be reconsidered under Michigan Law.

Since the Court finds that the conditions are appropriate to modify the injunction under Michigan law, this Court need not give full faith and credit to the injunction beyond what credit is afforded in Michigan. Therefore, this Court may revisit the terms of the injunction as it applies in this case.

The Court finds that the portion of the injunction that prevents Elwell from testifying about matters other than attorney client privilege, attorney work product and confidential information is not entitled to full faith and credit and will not be given effect in this Court.

Attorney Client and Attorney Work Product Privileges

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[4] The motions by NBC and the newspaper were not motions to receive discovery in other lawsuits.

While the Court has decided that the Michigan Injunction does not prevent the taking of Mr. Elwell's deposition, defendant contends that Elwell cannot testify without revealing privileged information, and therefore, the Court should not allow the deposition.

The Court's analysis of this contention begins with an examination of the law of privilege. Under Federal Rule of Evidence 501, all questions of privilege in a diversity action are to be decided according to state law, while claims of attorney work product are handled according to federal law. See, e.g., Airheart v. Chicago & N.W. Transp. Co., 128 F.R.D. 669, 670 (D.S.D. 1989). Missouri has codified an attorney-client privilege in V.A.M.S. § 491.060(3) (West Supp. 1992). That privilege protects testimony of an attorney "concerning any communication made to him by his client in that relation, or his advice thereon . . . " Id. That protection applies to: "1) Information transmitted by a voluntary act of disclosure; 2) between a client and his lawyer; 3) in confidence; 4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purposes for which it is to be transmitted." State v. Longo, 789 S.W.2d 812, 815 (Mo. App. 1990), citing State ex rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 384 (Mo. banc 1978). Corporations enjoy an attorney-client privilege for communications between employees and in-house counsel. See Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1980).[5]

This Court must apply the attorney-client privilege that is provided by Missouri law. In State ex rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. banc 1978), the Missouri Supreme Court rejected the narrow view of the attorney-client

[5] The Supreme Court did not establish a formal test for determining which communications between employees qualify. They instead advocated a case-by-case approach. Upjohn, 449 U.S. at 396.

privilege as proposed by Wigmore[6] in favor of a very broad privilege. The Court adopted a broader view that is intended to include much more than just the advice of the lawyer:

> When a client goes to an attorney and asks him to represent him on a claim which he believes he has against someone or which is being asserted against him, even if he as yet has no knowledge or information about the claim, subsequent communications by the attorney to the client should be privileged. Some of the advice given by the attorney may be based on information obtained from sources other than the client. Some of what the attorney says will not actually be advice as to a course of conduct to be followed. Part may be an analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney-client consultation. All should be protected."

State ex Rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 384-85 (Mo. banc 1978). The rule also applies broadly to communications from the client to the attorney. Id. at 384.

G.M. also asserts the attorney work product privilege as to

[6] At one time, the Missouri Supreme Court followed the Wigmore approach:

> It would protect the confidentiality of all of what the client says to the lawyer but would not protect all of what the lawyer says to the client. Of the lawyer's statements to his client, it would protect only (1) advice by the attorney concerning a communication to him by his client, (2) anything the lawyer said which could be an admission of his client, or (3) anything said by the lawyer that would lead to inferences concerning the tenor of what the client had said to him.

Elwell's communications. As noted above, the work product rule is created under federal law. It is now codified in Fed. R. Civ. P. 26(b)(3):

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

This codified version of the attorney work product privilege is limited to the discovery of "documents and other tangible things," and therefore is inapplicable to the case at hand. See, e.g., Baise v. Alewel's, Inc., 99 F.R.D. 95, 96 (W.D. Mo. 1983). However, defendant still contends that the thoughts and impressions of Elwell constitute attorney work product. This Court has noted before that:

> The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

Id. (quoting 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at 194 (1970)).

The sole issue before the Court at this time is whether Elwell is competent to give deposition testimony, given the nature of his relationship with the G.M. legal department. While the overall issue presents many ripe topics for discussion and analysis, the Court need only determine that there are matters about which Elwell may be deposed without disclosing privileged information.

In the Michigan Injunction, Elwell was granted an exemption from the ban on his testifying against G.M. so that he could render his testimony in the Moseley case, which was then pending. The Court views that exemption an admission by G.M. that it is possible for Elwell to testify without impermissibly divulging privileged information even as defined by G.M.. This is especially relevant because, as the Court understands it, Elwell testified for long stretches at a time without drawing an objection from G.M.. Furthermore, anything testified to in the Moseley case that might have been privileged has ceased to be so now that it has been made public. Based on this analysis alone, the Court finds that it is possible for Elwell to be deposed without necessarily revealing privileged information.

Furthermore, the Court notes that Elwell has testified either in Court or by deposition on numerous occasions in the past as [a] witness for G.M. or as a 30(b)(6) designated employee. Elwell gave approximately 60 depositions, and testified about 25 times concerning 1973-1987 pick-up trucks, nearly all of which involved post-collision fuel-fed fires. See Moseley v. G.M. Deposition, at p. 114, attached to plaintiff's motion as Exhibit E. Obviously, anything contained in that testimony is fair game.

The Court also notes that the claims of attorney work product are undermined substantially by the fact that plaintiffs do not seek documents or other tangible things. To the extent that plaintiffs seek facts from Elwell and information that is not written down, the work product doctrine is not an available avenue of objection. A party may not hide facts simply because

they are discovered in anticipation of litigation. See Baise v. Alewel's, Inc., supra. Specific applications of the privilege will be addressed at the deposition as it is taken pursuant to the rules laid down in this Order.

The Court finds G.M.'s argument that Elwell should be silenced to be a form of an abuse of the attorney client privilege by using it as a dual-edged sword. Elwell was employed to learn about the design, safety and performance of G.M. products so that he could assist the litigation department and assist in product development. When G.M. found it convenient, Elwell would put on his hat as an engineer and serve as the 30(b)(6) employee who was most knowledgeable about certain issues. He would then supply the plaintiff in a particular suit with the information G.M. wished to provide. However, now that Elwell is no longer a G.M. employee, G.M. seeks to put the toothpaste back in the tube by raising the attorney client privilege. Elwell, formerly the engineer witness, now becomes the untouchable legal assistant. This Court will not allow G.M. to use the attorney client privilege as a shield to protect its research into the safety and design of its automobiles in this manner.

Defendant cites AMC v. Huffstutler, 575 N.E.2d 116 (Ohio 1991) as authority for the propriety of enjoining an inhouse engineer from testifying. While the case is remarkably similar to this one, there is a major factual and legal distinction: the engineer in Huffstatler was also an attorney and represented AMC as counsel in many cases. The Ohio Supreme Court upheld an injunction that prevented the lawyer from testifying against AMC primarily on the basis that a lawyer gives up certain first amendment protections when he agrees to represent a client and be bound by the rules of professional conduct. Such is not the case with a non-lawyer, such as Elwell. The Court is not persuaded that Elwell cannot open his mouth without divulging privileged material. While the Court does believe that Elwell does in fact possess some information that should not be disclosed, that is a matter that goes to the scope of the deposition, not the decision of whether to allow it at all.

Defendants have also brought to the Court's attention three cases in which Elwell has not been allowed to testify. None of these cases compels this Court to follow their lead.

In Pippin v. G.M., No. 91-3401-CV-S-4 (W.D. Mo.), which is currently pending before Judge Russell G. Clark of this division, the judge addressed the issue during an informal discovery conference. Even though the issue was not formally briefed and was not even a preannounced subject of the conference, defense counsel raised the issue of plaintiff's intended deposition of Mr. Elwell. Judge Clark informally indicated that he would not allow Elwell to be deposed. There is no written memorialization of the matter.

In Harris v. General Motors, Case No. 111342 (Ca. Sup. Ct), the Court refused to allow Elwell to testify based on the Michigan injunction. The Court did not provide detailed reasons for the order (the order seems to be a proposed order submitted by G.M. and signed by the judge). Plaintiffs supply an affidavit by Elwell's attorney, Courtney Morgan, which states that Elwell was excluded from the Harris case because he had previously been retained by G.M. as a consultant on the Harris case, and had even been named as an expert for G.M., but the designation was later withdrawn.

Finally, Elwell's deposition was prevented by the Court in Carpenter v. General Motors, No. 91-CI-9034 (Bath Circuit Court, Kentucky). That Court ruled without further comment that the Michigan injunction should be entitled to full faith and credit.

None of these cases contains a full and critical analysis of the real issues of this case. Therefore, this Court is not inclined to follow their lead based on speculation about the reasoning they used or the facts that were before them.

Rule 11

While the overall quality of advocacy in this case and on this matter in particular has been of very high caliber, several

arguments and facts advanced by the parties in support of or in opposition to this motion have passed the bounds of permissible zealous advocacy into the shady realm of disinformation or deliberate deception. The Court finds the parties' characterizations of the Koval v. G.M. orders to border on violations of Rule 11.

Plaintiffs, in their initial motion, stated only that Mr. Elwell's deposition was taken in Koval and that the deposition was under a protective order. Plaintiffs then attached the text of the journal entry by Judge Anthony Calabrese which overruled G.M.'s motion to quash the subpoena for Elwell's deposition and ordered that the deposition proceed. Entry attached to plaintiffs' motion as Exhibit "H."

The Court was then shocked to read in defendant's suggestions in opposition that Judge Calabrese vacated the very order on which plaintiffs had relied. Given plaintiffs' in-depth knowledge of the situation and history of Ronald E. Elwell, the Court finds it nearly inconceivable that plaintiffs were unaware of the subsequent order vacating the authority which they had presented to the Court on this very delicate matter.

The second order referred to by G.M. is dated October 5, 1992, barely one month after Judge Calabrese ordered that the deposition proceed and three weeks after the deposition took place. The order, signed by Judge Robert M. Lawther, states:

> UPON consideration of General Motor's Motion for Reconsideration or, in the alternative, Motion to Strike and Seal in the September 15, 1992 deposition of Ronald Elwell, and after having had an opportunity to observe and review the testimony of Mr. Elwell at that deposition it is hereby ORDERED AND DECREED that:
>
> 1. The Orders denying General Motor's initial Motion for Protective Order seeking to quash the subpoena are vacated.
>
> 2. The [deposition] testimony of Ronald Elwell on September 15, 1992 is stricken.

Attached to defendant's suggestions in opposition as Exhibit "H." The Order also provides that all persons are to "refrain from disclosing the substance of the deposition testimony to any other person," return any written documents that relate to the testimony and notify General Motors of any persons to whom information relating to the deposition was disclosed. Id.

The order, and G.M.'s characterization of the order in their suggestions in opposition, suggest that the order was vacated by the judge on the merits of G.M.'s arguments and that the new order was designed by the judge to be consistent with the Michigan injunction.

The Court was surprised once again to read in plaintiff's reply that Judge Lawther's order is not what it seems. Plaintiffs attached an affidavit made by the plaintiff's attorney in the Koval case that casts real doubt on the propriety of defendant's suggestions. Attached to plaintiffs' reply as Exhibit "D."

The attorney stated that after G.M.'s motion to quash was denied by Judge Calabrese, G.M. appealed and filed a motion for a stay or induction pending appeal. Judge Calabrese issued a stay until September 15 to allow the Court of Appeals to take up the issue on an expedited basis or issue their own injunction. Judge Calabrese's injunction expired on September 15, 1992 and the deposition proceeded under the supervision of Judge Lawther and under a non-dissemination protective order issued by him. The deposition was not concluded on that day and was continued until October 1, 1992.

On October 5, 1992, according to the attorney, the case was settled and G.M., as a condition of the settlement, required the plaintiff to agree that the order permitting the deposition of Elwell be vacated and that all copies of the deposition be returned to the Court.

G.M. would have the Court believe, whether explicitly or by implicit argument, that the deposition order was vacated on its merits because the judge re-evaluated the law or facts. Instead, this affidavit demonstrates that the order was vacated only upon joint motion and pursuant to a settlement agreement. The

deposition order was vacated was that G.M. wanted to erase any official record that Mr. Elwell was permitted to testify. That G.M. now relies on the "Order" to support its position that a Court has sided with them is highly questionable.

The main difficulty the Court has with the conduct surrounding the Koyal orders is deciding whose conduct was more deceptive. The Court is confident that plaintiffs' obvious access to the Court files in the Koyal case would have revealed the facially unfavorable October 5, 1992 order. The Court is equally confident that defendant knew of the precise nature of the October 5, 1992 order. Neither party was candid with this Court. Missouri Supreme Court Rule 3.3 requires candor toward the tribunal — that includes refraining from misleading legal argument. The argument in this case is dangerously close to running afoul of both Rule 11 and the Missouri rules of professional conduct.

Conclusion

In Koyal, the judge offered G.M. the option of taking the deposition in camera and holding the deposition under seal until the Court could review G.M.'s objections as to attorney-client privilege, attorney work product and other confidential information. This Court will allow this deposition under the same protections. The deposition will proceed under the supervision of a magistrate judge. The Court expects that ground rules about areas of privilege will be established before the deposition, either by agreement or by the Court, and that all individual claims of privilege will be addressed as they arise and every effort will be made to maintain the confidentiality of privileged information.

Furthermore, insofar as plaintiffs' motion seeks permission to make a videotape recording of the deposition, that permission is granted.

Finally, on June 17, 1993, G.M. filed a motion for a protective order to cancel the deposition on Ronald E. Elwell that

is scheduled for June 23, 1993. The Court has reviewed the motion and supporting documents and finds that the deposition should proceed. However, the Court will afford a measure of protection to G.M. by preventing the widespread dissemination of Elwell's deposition. The deposition and its contents shall not be made available either in fact or in substance to any person or entity, other than the following persons: the parties to this lawsuit; their attorneys; and any witnesses for whom Elwell's testimony is necessary to prepare for trial.

Accordingly it is

ORDERED that plaintiffs' motion to take the deposition of Ronald Elwell is GRANTED. It is further

ORDERED that plaintiffs' motion to videotape record the deposition is GRANTED. It is

ORDERED that defendant's motion for protective order is DENIED.

JOSEPH E. STEVENS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated June 18, 1993